

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TDN MONEY SYSTEMS, INC.,	Plaintiff(s),	Case No. 2:15-CV-2197 JCM (NJK)
v.		ORDER
EVERI PAYMENTS, INC.,	Defendant(s).	

Presently before the court is a motion to continue trial (second request) by defendant Everi Payments Inc. f/k/a Global Cash Access, Inc. (GCA), requesting the court “for a brief continuance” of the current trial set for September 25, 2017. (ECF No. 126). Plaintiff TDN Money Systems, Inc. responded in opposition to this motion. (ECF No. 127). GCA replied. (ECF No. 129). The motion to continue trial is granted.

Also before the court is TDN's "emergency" motion *in limine*. (ECF No. 112). TDN filed a supplement to this motion without leave to do so, *see* Local Rule 7-2(g). (ECF No. 114). GCA responded. (ECF No. 115). TDN replied. (ECF No. 123). GCA countermoved for sanctions related to TDN's filing of the emergency motion *in limine*. (ECF No. 116). TDN responded. (ECF No. 124). GCA replied. (ECF No. 128). Both the emergency motion *in limine* (ECF No. 112) and the countermotion for sanctions (ECF No. 116) are denied.

I. Facts

a. Procedural History

The February 28, 2017 joint pretrial order set this matter for trial on August 21, 2017 and set calendar call for August 17, 2017. (ECF No. 76). Calendar call was later reset for August 16, 2017. (ECF No. 100).

1 On June 5, 2017, GCA moved for the first time to continue trial for two months. (ECF No. 81). GCA’s counsel cited burdensome discovery obligations in another case as a scheduling conflict and basis for the continuance. *Id.* TDN opposed, arguing that there was not a genuine scheduling conflict. (ECF No. 82). GCA replied. (ECF No. 83).

5 On June 16, 2017, this court denied GCA’s motion to continue trial. (ECF No. 84). This court noted that the February joint pretrial order expressly states that “[t]his order shall not be amended except for by order of the [c]ourt pursuant to agreement of the parties or to prevent manifest injustice.” *Id.* at 2. Absent an agreement of the parties, and finding that GCA “has failed to show that an amendment would prevent manifest injustice,” the court denied the motion. *Id.* The result was that the trial remained scheduled for August 21, 2017.

11 The deadline before trial to file motions *in limine* in this case was July 7, 2017, but the parties stipulated to an extended deadline of July 14, 2017. (ECF No. 86). The court granted the stipulation. (ECF No. 87).

14 On July 14, 2017 exactly, TDN filed six motions *in limine* (ECF Nos. 88–93) and GCA filed five (ECF Nos. 94–98), for a total of 11 motions. Responses for all of these motions were due by July 28, 2017.

17 On July 28, 2017 exactly, TDN filed its responses to GCA’s five motions *in limine* (ECF Nos. 101–05) and GCA filed its responses to TDN’s six motions *in limine* (ECF Nos. 106–11). Thus, as of July 28, 2017—less than a month before trial—all permissible briefing on motions *in limine* was complete, and no further motions *in limine* were permissible. *See LR 16-3.*

21 Nonetheless, TDN saw fit to file another. On August 2, 2017—after the agreed-upon deadline and local-rule deadline (*see Local Rule 16-3(a)*) for motions *in limine*—TDN filed an “emergency” motion *in limine* alleging witness intimidation, seeking further discovery, requesting an adverse inference in their favor, and asking for preliminary injunctive relief to “preclude defendant from threatening [a witness] in advance of the trial.” (ECF No. 112). Per Local Rule 16-3(a), a nonmoving party is entitled to 14 days to respond to a motion *in limine*, setting the response deadline for this late-filed motion *in limine* at August 16, 2017, the day of calendar call

1 for trial (and only four days before trial). TDN did not move for a continuance of trial in light of
2 the new facts alleged in TDN’s August 2 motion.

3 Thereafter, the parties continued filing motions. Two days later, on August 4, 2017, TDN
4 filed a motion for leave to file a reply in support of its motions *in limine*. (ECF No. 113). On the
5 same day, TDN also filed a “supplement” to its late-filed “emergency” motion *in limine* without
6 leave of court to do so (*see* Local Rule 7-2(g) (“Supplementation prohibited without leave of
7 court.”). (ECF No. 114). On August 15, 2017, defendant GCA responded to the late-filed motion.
8 (ECF No. 115).

9 Also on August 15, 2017—the day before calendar call—GCA filed a motion for sanctions
10 against TDN related to TDN’s August 2 “emergency” motion, arguing for attorney fees and costs
11 because “TDN disregarded nearly every rule in filing its motion, failed to conduct an adequate
12 meet-and-confer, and fails to include any facts or legal authority to support any of its positions
13 outlined in the motion. This motion was filed without advance warning during a critical time when
14 the parties are preparing for the upcoming trial. TDN fully knew this fact and merely sought to
15 ambush GCA with a last minute filing on the eve of trial.” (ECF No. 116). Because GCA asked
16 the court for a monetary sanction against TDN, TDN was entitled to be heard on the matter and
17 file a response. The time for TDN to respond to GCA’s motion for sanctions was 14 days, due by
18 August 29, 2017—over a week after the date set for trial.

19 On the day of calendar call, Magistrate Judge Koppe ruled on TDN’s motion for leave to
20 file a reply, granting the motion and thus docketing TDN’s reply to the motions *in limine*. (ECF
21 Nos. 119, 120). Thus, as of the date of calendar call, briefing on the timely motions *in limine* was
22 not finally completed until that day. Further, GCA’s response to TDN’s late-filed “emergency”
23 motion *in limine* and motion for sanctions had just been filed the day before, to which a response
24 was not due until after the start of trial.

25 Accordingly, because of the status of the pretrial motions, court staff at calendar call
26 indicated correctly that this case was not ready for trial. Staff directed the parties to enter a
27 stipulation to continue trial to September 25, 2017, with calendar call on September 20, 2017.

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1 GCA's counsel indicated that it was available for trial on that date, but noted that it would
2 ask TDN to continue the trial to a later date due to counsel's busy schedule. (ECF No. 121 at 1).
3 GCA requested that TDN agree to a date on or after November 6, 2017. *Id.* TDN declined. *Id.* at
4 2.

5 On August 18, 2017, the court entered an order accepting the stipulation and continuing
6 trial to September 25, 2017. (ECF No. 122). That is the current trial date, with calendar call on
7 September 20, 2017. (ECF No. 125).

8 **b. Instant Motion to Continue**

9 On August 22, 2017, defendant GCA moved to continue trial (it indicated previously that
10 it would if TDN would not agree to a stipulation). (ECF No. 126). GCA now argues that the new
11 trial date of September 25, 2017 will prejudice its ability to prepare for trial because several
12 depositions in another matter are set to occur from September 25, 2017 to October 13, 2017; from
13 October 2, 2017 to October 5, 2017, key employees of GCA will be participating in an annual
14 international gaming trade show and conference that is critical to the company's business every
15 year, which would make it difficult for them to appear as witnesses on or around these dates;
16 between August 27 through September 9, GCA's counsel will be out of the country on another
17 matter; finally, GCA's counsel is committed to trying a case in the United States Federal Court of
18 Claims in Washington, D.C. for the two weeks immediately preceding this trial (which is set to
19 take place between September 11, 2017 and September 22, 2017). (ECF Nos 126, 126-1, 126-2).
20 GCA points out that it never agreed to the current September 25, 2017 date, but that this setting
21 "was made by the Court due to many outstanding motions, including Plaintiff [TDN's] last-minute
22 motion in limine filed on the eve of trial." (ECF No. 129 at 1). Therefore, GCA requests a
23 continuance of trial to the earliest stack following November 6, 2017.

24 Plaintiff TDN opposes, arguing that the joint pretrial order "shall not be amended except
25 by order of the Court pursuant to an agreement of the parties or to 'prevent manifest injustice.'" (ECF No. 127). TDN argues that GCA's counsel is actually available during the three-week trial
26 stack in which this case is set for trial on September 25, 2017; that this is not a genuine or new
27 conflict because the original trial date of August 21, 2017—assuming the trial lasted the full three
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1 weeks of the three-week trial stack until September 8—would have given GCA’s counsel the same
2 number of days between trials as GCA currently has (3 days); for the past six months, the two
3 trials have been set to run back-to-back so this excuse now is a “post hoc justification to delay this
4 trial”; “this trial probably will not begin on September 25 because 13 criminal cases in the same
5 three-week stack will have priority”; and “[a] federal trial should take precedence over a trade
6 show.” *Id.* TDN requests that this court keep the September 25 trial date.

7 GCA replied in support of its motion on August 25, 2017. (ECF No. 129).

8 **c. The Emergency Motion in Limine and Countermotion for Sanctions**

9 TDN’s late-filed “emergency” motion in limine alleges that GCN engaged in witness
10 intimidation by one of its representatives sending a demand letter to a witness that related to an
11 alleged indemnification agreement with GCN. (*See generally* ECF No. 112). TDN alleges that a
12 GCN employee also called this witness to relay the same information to him. *Id.* In its emergency
13 motion, TDN demanded (1) production of the letter in question, (2) the imposition of an adverse
14 inference at trial related to the witness’s testimony, and (3) a preliminary injunction ordering the
15 defendant from “threatening” the witness in advance of the trial. *Id.*

16 In TDN’s improperly filed supplement to the late-filed emergency motion *in limine*, TDN
17 attached an affidavit of the witness in question—Bernard Boyle, former owner of Western Money
18 Systems, the predecessor in interest to defendant GCA—which states that “[o]n or about July 19,
19 2017, a GCA employee and representative . . . contacted me by telephone and told me that I would
20 be sued by GCA if GCA loses the trial in the within action.” (ECF No. 114-1).

21 GCA responded and countermoved for sanctions against TDN for filing the allegedly
22 frivolous emergency motion *in limine*. (ECF Nos. 115, 116). GCA argues that this was simply a
23 demand letter sent to preserve its rights thereunder, which “notified and demanded that [the Boyle
24 Family Trust, of which the witness Bernard Boyle is trustee,] confirm within thirty days that it will
25 indemnify GCA for any losses it may incur as the result of the TDN Lawsuit.” (ECF No. 116 at
26 6). GCA argues that nothing in the letter “threatened” the witness with a lawsuit if he testified at
27 trial. *Id.* Instead, GCA argues that the agreement between GCA and the witness and Boyle Family
28 Trust “expressly requires GCA to send a request for indemnification prior to initiating any

1 litigation for indemnification.” *Id.* at 7. Thus, GCA argues that its act of sending this letter—
2 thereby protecting and preserving its rights under the indemnification clause—does not amount to
3 “witness intimidation” under any legal authority. *Id.* at 6–7. In support of their argument, GCA
4 attached the requested letter sent to the witness. (ECF No. 116-5). This letter describes GCA’s
5 position on the legal matter debated in this lawsuit and notifies the Boyle Family Trust and Bernard
6 Boyle that the Boyle Family Trust agreed to indemnify and hold GCA harmless under the
7 circumstances GCA alleges this lawsuit involves, and requests the trust to confirm within thirty
8 days of the receipt of the letter that it will indemnify GCA “for any losses it may incur as the result
9 of the TDN Lawsuit.” *Id.*

10 **II. Legal Standard**

11 As a threshold issue, the parties debate the applicable legal standard for the motion to
12 continue. TDN argues that the court is bound by the last sentence of the February 28, 2017 pretrial
13 order, which states, “This order shall not be amended except by order of the Court pursuant to
14 agreement of the parties or to prevent manifest injustice.” (ECF No. 76). However, the date the
15 pretrial order set for trial was August 21, 2017, which is no longer the date set for trial—rather,
16 the court ordered the date to be continued to September 25, 2017. In other words, the current trial
17 date is not a component of the pretrial order. Thus, a continuance of the current trial date would
18 not constitute an amendment of the pretrial order, so this sentence of the pretrial order no longer
19 governs. Rather, the order governing the current trial date, the order of continuance (ECF Nos.
20 87), includes no express limitation on the court’s discretionary power to again continue trial if the
21 September 25, 2017 proves inconvenient for any reason.

22 Instead, GCA argues that the governing standard is found in Federal Rule of Civil
23 Procedure 6(b) and a four-factor test espoused by the Ninth Circuit in *United States v. Flynt*, 756
24 F.2d 1352, 1359 (9th Cir. 1985).

25 The decision to grant or deny a requested continuance lies within the broad discretion of
26 the district court. *Flynt*, 756 F.2d at 1358. The exercise of a district court’s discretion on a motion
27 to continue will not be disturbed unless the court’s decision is arbitrary or unreasonable. *Id.*

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1 The *Flynt* court evaluated whether the district court clearly abused its discretion in denying
2 a criminal defendant a continuance. It relied on the following factors:

3 First, we consider the extent of [movant's] diligence in his efforts to ready his [case]
4 prior to the date set for hearing. . . .

5 Second, we consider how likely it is that the need for a continuance could have
6 been met if the continuance had been granted. . . .

7 Third, we consider the extent to which granting the continuance would have
8 inconvenienced the court and the opposing party, including its witnesses. . . .

9 Finally, we consider the extent to which the [movant] might have suffered harm as
10 a result of the district court's denial.

11 *Id.* at 1359 (citations omitted).

12 In exercising this court's broad discretion ruling on the present motion, this court has
13 considered the factors in *Flynt* as well as the arguments and points made by the parties in their
14 briefing and affidavits.

15 **III. Discussion**

16 **a. Motion to Continue**

17 GCA has shown good cause for the continuance it requests and this court is not persuaded
18 by TDN's arguments in opposition. It appears that between now and this newly set trial date, GCA
19 counsel will have little opportunity to adequately prepare due to other commitments immediately
20 following this trial, a conflict which may substantially prejudice its client. Also, trial on the current
21 date may likely needlessly interfere with depositions GCA has scheduled in another demanding,
22 time-sensitive action in state court, a which conflict a continuance could easily solve. Further,
23 whether or not TDN is correct that a federal trial "should take precedence over a trade show" (ECF
24 No. 127), this does not mean that this court cannot try to work with GCA's demanding schedule
25 around this time in order to accommodate both the trial and the trade show and thus avoid
26 unnecessary damage to GCA's business.

27 Next, TDN's argument is transparently disingenuous that, had this case proceeded on the
28 original date of August 21, 2017, GCA's counsel would have had the same number of days
between this trial and its other trial in the United States Federal Court of Claims as GCA has under
the current schedule. This argument presumes that this trial would last the full three weeks of the

1 three-week trial stack, but this is a presumption that is both unfounded and is something that TDN
2 itself has expressly disclaimed in its own prior filings: in the joint pretrial order, TDN represented
3 that it estimates “the trial herein will take a total of 4-5 days,” while GCA predicted the trial will
4 be only 7 to 10 days. (ECF No. 76 at 25). If TDN’s own prediction is correct, this would have
5 given GCA a full two weeks between trials if this case had proceeded to trial on the original date.
6 The new date, in contrast, gives GCA only three days between a trial in Washington, D.C., and the
7 instant trial here in Las Vegas, Nevada.

8 This court is unpersuaded by TDN’s prediction that “this trial probably will not begin on
9 September 25 because 13 criminal cases in the same three-week stack will have priority.” This
10 consideration—even if it were true—has no bearing on this court’s analysis for dates it sets for
11 trial.

12 Finally, it appears to this court that GCA has largely complied with its pretrial obligations
13 and would have been prepared to go forward with trial on the date set by the pretrial order. GCA
14 requested a continuance and was denied, and then proceeded to comply with the pretrial motion
15 deadlines nonetheless. The primary reason that this case was not ready for trial on August 21,
16 2017 was TDN’s filings after the deadline to file motions in limine. TDN filed a substantive
17 motion in limine beyond the deadline for such motions, requesting extraordinary injunctive relief
18 that could have a substantive impact on the trial. These were not matters to handle in a motion in
19 limine on the eve of trial and, if the motion were truly merited, it required a continuance of trial.
20 TDN also requested the court to grant leave to file a reply to the motions in limine, which was not
21 granted by the magistrate until the day of calendar call, meaning the district court was unable to
22 rule on these pending matters before that time. GCA’s response and motion for sanctions each
23 related to TDN’s late-filed motion in limine.

24 In response to TDN’s actions, the matter needed to be continued. The court is convinced
25 that the new date selected at calendar call would be a substantial burden for both GCA and its
26 counsel. Further, TDN has not convinced the court that a brief continuance would substantially
27 prejudice TDN or its counsel. Accordingly, the motion is granted.

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b. The Emergency Motion and the Countermotion for Sanctions

The court has reviewed the arguments and evidence related to each of these motions, including the Stock Purchase Agreement. (ECF Nos. 112, 116, 38-4). The emergency motion *in limine* was filed after the agreed deadlines for motions in limine, and therefore must be denied. If this situation were truly as dire as TDN suggested, it needed to move to continue the trial to allow the court an adequate opportunity to address the situation. Furthermore, the supplement to the motion in limine was filed without leave of court.

Nonetheless, the court has reviewed the merits of the motion due to the severity of the allegations made in the motion. Still, the court denies relief. The parties debate whether the demand letter for indemnification constituted witness intimidation. GCA contends that it was a valid demand letter and therefore could not constitute witness intimidation, and TDN contends that it was simple intimidation because the demand was invalid under the Stock Purchase Agreement containing the indemnification clause. TDN argues that the language of the Stock Purchase Agreement required GCA to send that letter long before it did here or it has waived its indemnification claim, and therefore, this could not have been a valid request. GCA still maintains that it will pursue this indemnification claim if it does not prevail at trial.

The timing of the demand letter is concerning but the court does not find that it rises to the level of witness intimidation. If the demand is truly frivolous, then it should have little impact on how Bernard Boyle chooses to testify at trial. Further, if Bernard Boyle in fact does change his testimony at trial from the testimony he gave in his deposition, he will be subject to cross-examination based on his prior inconsistent statements and potential bias. Nothing about this order prevents TDN from raising the letter as evidence of bias in that situation.

TDN's request for the production of the letter is now moot because GCA has produced it. Also, given this court's analysis of this issue described above, TDN is not entitled to an adverse inference in its favor. Whatever inconsistencies in Mr. Boyle's testimony may arise at trial, this court is confident that the issue may be adequately addressed by cross-examination. Finally, TDN is not entitled to this court's extraordinary intervention in the form of injunctive relief, which the court concludes is unnecessary to address any potential problems here and is never awarded as of

1 right. *See Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (quoting *Summers*
2 *v. Earth Island Inst.*, 555 U.S. 488 (2009)) (holding that for injunctive relief, a plaintiff must show
3 itself to be “under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat
4 must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the
5 challenged action of the defendant; and it must be likely that a favorable judicial decision will
6 prevent or redress the injury.”).

7 Finally, this court does not consider these circumstances to warrant sanctions.

8 **IV. Conclusion**

9 Accordingly, good cause appearing,

10 IT IS HEREBY ORDERED that GCA’s motion to continue trial (ECF No. 126) is
11 GRANTED.

12 IT IS FURTHER ORDERED that the September 25, 2017 trial date is vacated and the trial
13 date is hereby reset as follows: **Jury Trial set for December 4, 2017, at 9:00 a.m. in LV**
14 **Courtroom 6A before Judge James C. Mahan. Calendar Call set for November 29, 2017, at**
15 **1:30 p.m. in LV Courtroom 6A before Judge James C. Mahan.** Exhibit List, Proposed Findings
16 of Fact and Conclusions of Law, Proposed Voir Dire, Proposed Jury Instructions and Trial Briefs
17 are due at calendar call.

18 IT IS FURTHER ORDERED that plaintiff TDN’s emergency motion *in limine* (ECF No.
19 112) is DENIED.

20 IT IS FURTHER ORDERED that defendant GCA’s countermotion for sanctions (ECF No.
21 116) is DENIED.

22 DATED September 6, 2017.

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UNITED STATES DISTRICT JUDGE
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